this Circuit two of our sister Court of Appeals have already specifically examined and analyzed the issue, reaching contrary conclusions". 420 F.3d at 225. The two cases were *McDonald v. NYSA-ILA Pension Plan*, 320 F.3d 151 (2d Cir. 2003), and *Jones v. UOP*, 16 F.3d 141 (7th Cir. 1994). After reviewing the two cases and noting that "this question is a close and difficult one", the Third Circuit ruled in DiGiacomo's favor, adopting the Second Circuit's analysis in *McDonald*.

REASONS FOR GRANTING THE PETITION

The Third Circuit denied fees to DiGiacomo because the statutory issue involved was a "close and difficult one", so that the Fund's benefit denial was not "culpable" or in "bad faith". Allowing a disqualifying rule like this turns Congress' purpose in authorizing attorney's fees in ERISA cases on its head. ERISA Section 502(g)(1) provides in pertinent part:

> In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

As this Court has found, "ERISA authorizes the award of attorney's fees":

> in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby risking underenforcement of beneficiaries' statutory rights . . .

Massachusetts Mutual v. Russell, 473 U.S. 134, 147, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985).

DiGiacomo possessed a small benefit claim - less than $500 per month - based on a broad statutory right which affected many other participants. He sued to enforce that right and won. If his claim, as the Third Circuit has held, presented a statutory question that was "close and difficult", causing the likelihood of success to be small, there was more, rather than less, reason to award attorney's fees to his counsel, who was willing to undertake such risky representation.

Close to 30 years ago, the United States Court of Appeals for the Tenth Circuit in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), developed a five-factor standard for the courts to use in determining whether to award attorney's fees in ERISA cases. That test, which has been adopted by all circuit courts,[2] examines:

> (1) the degree of the offending parties' culpability or bad faith; (2) the degree of the ability of the offending parties to personally satisfy an award of attorneys fees; (3) whether or not an award of attorneys fees against the offending parties would deter other persons acting under similar

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2. *Gray v. New England Telephone*, 792 F.2d 251 (1st Cir. 1986); *Miles v. NYS Teamsters Conf. Pension Plan*, 698 F.2d 593, 602 (2d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983); *Ursic v. Bethlehem Mines*, 719 F.2d 670, 672-73 (3d Cir. 1983); *Reinking v. Philadelphia American Life Ins Co.*, 910 F.2d 1210, 1217-18 (4th Cir. 1990); *Iron Workers Local No 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980); *Department of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985); *Leigh v. Engle*, 727 F.2d 113, 139 n.39 (7th Cir. 1984); *Lawrence v. Westerhaus*, 749 F.2d 494, 496 (8th Cir. 1984); *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980); *Fine v. Semet*, 699 F.2d 1091, 1095 (11th Cir. 1983); and *Eddy v. Colonial Life Ins Co.*, 59 F.3d 201, 210 (D.C. Cir. 1995).

> circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' positions.

587 F.2d at 465.

The reasons for granting the Petition are, first, that there is a conflict among the circuits in applying the five-factor standard, and, second, that the standard conflicts with the purpose of ERISA's fee shifting provision, as found by *Russell*.

I. THERE IS A CONFLICT AMONG THE CIRCUITS IN APPLYING THE FIVE-FACTOR STANDARD TO A PREVAILING PARTY

A. The Third Circuit Is Alone In Holding That Bad Faith Is A Sine Qua Non For Fee Awards

The Third Circuit applied the five-part standard as follows:

> Even assuming, *arguendo*, without deciding, that the remaining [three] factors weigh in favor of an award of attorney's fees, we believe that the first and fifth . . . factors so strongly militate against such an award as to control our determination. Accordingly, we deny DiGiacomo's application for attorney's fees.

The Third Circuit's decision looked solely to the first and fifth factors in denying the fee award. With respect to the fifth factor ("the relative merits of the parties' positions"), it cannot plausibly have been in the defendants' favor since

the plaintiff won the case and secured all the relief that he sought. *See Lockrey v. Leavitt Tube Employees' Profit Sharing Plan*, 1991 U.S. Dist. LEXIS 17175 (N.D. Ill. 1991) (finding fifth factor "neutral" where both positions had merit, but recognizing that "an ward of fees can be justified even when the relative merits of the parties' positions does not tip decidedly in favor of the party requesting fees"); *Oregon Laborers-Employers Trust Funds v. Pacific Fence and Wire Co.*, 1990 U.S. Dist. LEXIS 7278, *6 (D. Or. 1990) ("In cases where the losing party simply failed to prove its case, this factor has been found to be neutral").

With respect to the first factor ("the degree of the offending parties' culpability or bad faith"), the Third Circuit's own precedents show that "culpability" can arise if the party's conduct "involve[d] the breach of a legal duty." *McPherson v. Employees' Pension Plan of America Re-Insurance Co.*, 33 F.3d 253, 257 (3d Cir. 1994). In this instance, the Third Circuit held that the forfeiture of Mr. DiGiacomo's benefits violates ERISA's break-in-service provisions. While this may not establish "culpability" by itself, it certainly does not move the factor so "strongly" in the defendants' column as to preclude discretion to make an attorney's fee award.

Unlike the Third Circuit, most circuits hold that the *Eaves* standard merely offers a list of five factors for the district court to examine. The presence or absence of any one factor is not determinative, nor is it required that a prevailing party satisfy a majority of the factors. *See, e.g., Gard v. Blankenburg*, 33 Fed. Appx. 722, 731 (6th Cir. 2002) ("These considerations represent a flexible approach, and no single factor is dispositive"); *Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1345 (11th Cir. 2001) ("No one of these factors

is necessarily decisive"); *Riley v. Administrator of the Supersaver 401k Capital Accumulation Plan*, 209 F.3d 780, 782 (5th Cir. 2000) (abuse of discretion for district court "to endow the single factor of culpability or bad faith with exclusive powers of control"; court should "consider and explicate" each factor "and do so without giving predominance or preclusive effect to any one of them"); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1209 n.17 (10th Cir. 1992) ("no single factor should be held dispositive"); *Carpenters Southern California Administrative Corp v. Russell*, 726 F.2d 1410, 1416 (9th Cir. 1984) (no factor "is necessarily decisive"); *Gray v. New England Tel & Tel Co., supra*, 792 F.2d 251, 258 (1st Cir. 1986) (no factor "should be dispositive").

The Third Circuit's decision in *DiGiacomo* represents a marked departure from these precedents and even from the Third Circuit's own precedents that each factor must be balanced and that no one is determinative. *See Fielas v. Thompson Printing Co.*, 363 F.3d 259, 275 (3d Cir. 2004) (the factors "are not requirements in the sense that a party must demonstrate all of them in order to warrant an award of attorneys fees"); *Tomasko v. Weinstock*, 2003 U.S. App. LEXIS 23536, *12 (3d Cir. 2003) (vacating and remanding denial of fees where court failed to articulate an analysis of all five factors); *Anthuis v. Colt Industries Operating Corp.*, 971 F.2d 999, 1011 (3d Cir. 1992) ("each factor is "to be balanced and considered"); *Ellison v. Shenango Inc. Pension Bd.*, 956 F.2d 1268, 1278 (3d Cir. 1992) (remanding and ordering district court to "reconsider each factor in balance and relationship to the others").

A court must examine all of the *Eaves* factors in balance and in light of the statutory purpose as described in *Russell*

before determining whether a fee award is proper. *See, e.g., Smith v. Contini*, 2003 U.S. Dist. LEXIS 14336, *4-5 (D.N.J. 2003) (granting attorneys' fees where only three factors weigh in favor of a fee award and two factors are neutral). The Third Circuit's newfound approach would, inconsistently with all the other circuits, make the first and the fifth factors preclusive (even though the fifth factor, the "relative merits," should have been at worst neutral under any examination). No other circuit has made the first factor preclusive by itself, denying fees when the denial of benefits is ultimately determined to be unlawful, but the court's decision was "close and difficult".

B. There Is A Split Among The Circuits As To Whether There Is A Presumption In Favor Of Awarding Fees To A Prevailing Party

In the application of the five-factor standard, there is a split among the Circuit Courts as to whether there should be a presumption in favor of awarding fees to a prevailing party. The Eighth Circuit has adopted that presumption by analogy to the fee-shifting presumption in the civil rights statutes, as interpreted in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980). Under this presumption, a prevailing plaintiff should be awarded attorneys' fees. *Hensley* at p. 1937.

Although it has not expressly adopted the *Hensley* analogy, the Ninth Circuit applies the five-factor standard along with the presumption that a prevailing plaintiff in an ERISA action should ordinarily recover attorney's fees. *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 590 (9th Cir. 1984).

The Seventh Circuit has held that ERISA does not create a presumption for the award of attorney's fees to prevailing plaintiffs. However, it has adopted the prevailing party presumption used in the Equal Access to Justice Act, which provides that attorney's fees should be awarded to the prevailing party unless such special circumstances would render such an award unjust. *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 830 (7th Cir. 1984).

The D.C. Circuit has adopted the five-part test while, at the same time, explicitly rejecting the *Hensley* presumption that an award to a prevailing plaintiff is appropriate absent exceptional circumstances. *Eddy v. Colonial Life Insurance Company of America*, 59 F.3d 201, 203 (D.C. Cir. 1995). The First, Third, Fifth and Sixth Circuits have also expressly rejected the *Hensley* analogy between the fee-shifting provisions under ERISA and the civil rights statutes[3] and, instead, apply the five-part test on a case-by-case basis to determine whether attorney's fees should be awarded.

The Second, Fourth, Tenth and Eleventh Circuits have not expressly rejected the *Hensley* analogy, but have held that the determination as to whether or not attorney's fees should be granted pursuant to the five-part test is a discretionary decision to be made by the court.[4]

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3. *See Gray v. New Englard Tel & Tel Co., supra*, 792 F.2d at 258-59; *Ellison v. Shenango Inc. Pension Board*, 956 F.2d 1268, 1274-75 (3d Cir. 1992); *Iron Workers Local No 272 v. Bowen, supra*, 624 F.2d at 1265-66; *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1302 (6th Cir. 1991).

4. *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987); *Quesinberry v. Life Ins Co.*, 987 F.2d 1017, 1030 (4th Cir. 1993) (en banc); *Gordon v. United States Steel Corp.*, 724 F.2d 106, 108 (10th Cir. 1983); *Nachwalter v. Christie*, 805 F.2d 956, 961 (11th Cir. 1986).

The rationale for not following the presumption in favor of awarding fees established in *Hensley* is, as enunciated in *Eddy v. Colonial Life, supra*, 59 F.3d at 205, that: "The interests furthered by ERISA differ substantially from those furthered by the civil rights statutes . . . Civil rights are constitutionally based; ERISA rights are statutory. In addition, ERISA protects economic interests, while the civil rights statutes advance dignitary as well as economic interests."

This distinction should not have been drawn, both in light of Congress' purposes and because most civil rights actions seek to establish economic interests, too, whether in hiring, promotion, equal pay, etc. Treating employee benefits - such as pension, health and disability insurance benefits - as less important than the economic interests involved in civil rights is inconsistent with Congress' clear direction. As the Romans knew so well, "*primum edere, deinde philosophari*".

ERISA's preamble announces Congress' intent to provide participants with "ready access to the federal courts" to enable them to protect their rights to benefits. 29 U.S.C. § 1001(b). Courts have explained that the purpose of ERISA § 502(g)'s provision is "to secure effective access to federal courts." *Smith v. CMTA-IAM Pension Trust, supra*, 746 F.2d at 589.

The Third Circuit's position is untenable because it goes to the other extreme and effectively creates a presumption *against* awarding fees in "close and difficult" cases. In addition to Congress' clear intent, there are substantial policy reasons against creating such a presumption in cases that vindicate ERISA's "economic" interests, particularly when the claim of the individual plaintiff is relatively small. No individual ERISA beneficiary will rationally seek to

vindicate his economic interests if the cost of doing so exceeds the benefit. (In the case at bar, attorney's fees incurred so far in the district court and court of appeals exceed $60,000, for a $ 500/month benefit). If attorney's fees are not to be awarded, the costs of vindicating those interests invariably will exceed the benefit.

It makes little sense for Congress to provide a panoply of statutory rights which employees are unable to enforce because no attorney will rationally accept a case that is "close and difficult." Denying fees to a prevailing plaintiff solely because the legal issue was a "close and difficult one" means that, in order to qualify for fees, a beneficiary must prevail on an issue that is neither "close" nor "difficult", i.e., where a benefit denial is frivolous or close to frivolous. With all due respect, that could not have been Congress' intent in adopting the ERISA fee-shifting provision that omits a "prevailing party" requirement.

It also means that, by denying fees when the legal issue involved is a difficult one, some circuits, including the Third Circuit, choose to discourage beneficiaries from vindicating their statutory rights ,"thereby risking underenforcement of beneficiaries' statutory rights." *Russell*, 473 U.S. at 147. That choice is clearly contrary to the purpose of ERISA's fee-shifting provision, namely the elimination of "a barrier to maintenance of suits for small claims". *Id.*

II. EAVES' FIVE-PART TEST IS INCONSISTENT WITH THE PURPOSE OF ERISA'S FEE-SHIFTING PROVISION ENUNCIATED IN *RUSSELL*

The *Eaves* court did not explain how it derived its five-factor standard, which sprung fully formed like Minerva from Jupiter's knee, without any reference to ERISA's purpose. Moreover, it has not been re-examined in light of *Russell*, which was decided eight years after *Eaves*. That standard, however, is inconsistent with the purpose of ERISA's fee-shifting provision, as enunciated in *Russell*.

Unlike numerous other statutes that provide for fee-shifting only to a "prevailing party", ERISA provides a district court with greater discretion by providing that "the court in its discretion may allow a reasonable attorney's fee and costs of action *to either party*." (Emphasis added) Thus, under ERISA a party need not be "prevailing" to qualify for fees.

Some courts have ignored the difference in language and limited fee awards to the "prevailing party". *See, e.g., Griggs v. E.I. Dupont De Nemours & Co.*, 385 F.3d 440, 453 (4th Cir. 2004) ("Although the statute is silent in this regard, we have interpreted section 1132 as authorizing an award of attorney's fees only to a prevailing party"). Other courts, noting the difference in ERISA's fee shifting provision, have held that, at least theoretically, a party need not be a "prevailing party" to qualify for fees. *See, e.g., Miles v. NYS Teamsters Pension Plan, supra*, 698 F.2d at 602 ("Although success on the merits is not, in theory, indispensable to an award of attorney's fees under 29 U.S.C. § 1132(g)(1), rarely will a losing party in an action such as this be entitled to fees").

In fact, however, thirty years after ERISA's effective date, *no court* has awarded fees to a non-prevailing party, while many courts have denied fees to a "prevailing party", as the Third Circuit has done in the case at bar. In short, some courts have interpreted the fact that Congress did not require an ERISA beneficiary to be "prevailing" to qualify for fees, as providing them with discretion to *deny* fees to a prevailing party, rather than as an invitation to *award* fees to a non-prevailing party under certain circumstances.[5]

As this Court has held with regard to fee-shifting statutes generally, "[a]lthough the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits." *Independent Federation Of Flight Attendants v. Zipes*, 491 U.S. 754, 758, 109 S. Ct. 2732, 105 L. Ed. 2d 639 (1989). Those "limits" are to be found in "'the large objectives' of the relevant Act." *Id.* at 759, citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). For example, in light of the purposes of the Civil Rights Act of 1964, "a prevailing plaintiff should 'ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Independent Federation*, 491 U.S. at 759.

The Supreme Court has validated the use of "several nonexclusive factors" in determining whether to award attorneys' fees so long as the factors are faithful to the

5. Courts have noted, however, that ERISA does not require "prevailing party" status for purposes of applying the "catalyst theory", which this Court held inapplicable to "prevailing party" fee shifting statutes in *Buckhannon v. West Virginia HHS Dept.*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). *See, e.g., Adams v. Bowater*, 313 F.3d 611, 615 (1st Cir. 2002).

statutory purpose. *See Fogerty v. Fantasy, Inc*, 510 U.S. 517, 534 n.19, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994). In the current application of the five-part standard by several of the circuits, the statutory purpose of ERISA, to protect employee rights and secure effective access to federal courts, is not being fulfilled. The only way to assure that ERISA plaintiffs can enforce their rights under ERISA is to require a mandatory award of attorneys' fees for prevailing plaintiffs. *See* Ann C. Bertino, "The Need for a Mandatory Award of Attorney's Fees for Prevailing Plaintiffs in ERISA Benefits Cases", 42 Catholic University Law Review 871 (1992).

In sum, the proper standard must be the *Hensley* standard, whereby a prevailing party is always entitled to fees. A court's discretion under ERISA's fee shifting provision to "allow a reasonable attorney's fee and costs of action to either party", must be construed to mean that it is permissible under certain circumstances for a court to award fees to a losing beneficiary, e.g., in a "close and difficult case", or to a prevailing defendant, e.g., where the beneficiary's claim was frivolous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED NOVEMBER 15, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-3510

ALFRED DIGIACOMO,

Appellant,

v.

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY,

Appellee.

Before: SCIRICA, *Chief Judge*, ALITO* and GARTH, *Circuit Judges*

(Opinion Filed: November 15, 2005)

OPINION OF THE COURT DENYING APPELLANT'S APPLICATION FOR ATTORNEY'S FEES

* Judge Alito did not participate in the conference resulting in this Opinion.

Appendix

GARTH, *Circuit Judge*:

Alfred DiGiacomo brought this action against the Teamsters Pension Trust Fund of Philadelphia and Vicinity (the "Fund") pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, alleging that the Fund incorrectly computed his pension benefits by refusing to credit pre-ERISA service time accrued prior to a break-in-service. The District Court granted the Fund's motion to dismiss on the ground that ERISA did not preclude the Fund from relying on certain break-in-service provisions in its governing pension plan. Those provisions explicitly permitted the Fund to exclude DiGiacomo's pre-ERISA service time accrued prior to his break-in-service. A divided panel of this Court reversed, holding that Section 204 of ERISA, 29 U.S.C. § 1054, trumped the plan's break-in-service provisions and thus required the Fund to aggregate DiGiacomo's pre-break and post-break service time in calculating his accrued benefit. *See Digiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 420 F.3d 220 (3d Cir.2005).[1]

We revisit this matter only to decide whether DiGiacomo, as the prevailing party, is entitled to attorney's fees under ERISA, 29 U.S.C. § 1132(g)(1).[2] That provision provides

1. The Court denied the Fund's Petition for Rehearing En Banc on October 5, 2005.

2. DiGiacomo's counsel seeks $38,920.00 in attorney's fees for services rendered in successfully bringing an appeal from the District Court's dismissal of the action. We requested that the Fund respond

(Cont'd)

that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1) (emphasis added); *see also Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir.1983) (noting that 29 U.S.C. § 1132(g)(1) "does not automatically mandate an award to a prevailing party") (citation omitted). We have set forth the following five factors to guide the exercise of such discretion:

(1) the offending parties' culpability or bad faith;

(2) the ability of the offending parties to satisfy an award of attorneys' fees;

(3) the deterrent effect of an award of attorneys' fees against the offending parties;

(4) the benefit conferred on members of the pension plan as a whole; and

(5) the relative merits of the parties' position.

Ursic, 719 F.2d at 673.

We conclude that application of the *Ursic* factors does not support DiGiacomo's request for an award of attorney's fees. Our determination is particularly informed by the first and fifth *Ursic* factors. As we noted earlier in these

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(Cont'd)

to DiGiacomo's application for attorney's fees. On November 8, 2005, the Fund filed Appellees' Response in Opposition to Appellant's Application for Attorney's Fees, arguing that DiGiacomo has failed to satisfy the guidelines set forth in *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir.1983) for an award of attorney's fees.

proceedings, the question presented by this appeal — "whether, for accrual of benefit purposes, ERISA prevents pension plans from denying credit for pre-ERISA service time accrued prior to a break-in-service" — is a "close and difficult one." *Digiacomo*, 420 F.3d at 225. The question has divided the Courts of Appeals. *Compare McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 153 (2d Cir.2003) *with Jones v. UOP*, 16 F.3d 141, 143 (7th Cir.1994) and *Redmond v. Burlington N. R.R. Co. Pension Plan*, 821 F.2d 461, 466-67 (8th Cir.1987). And it has led to a division within our Court. *See Digiacomo*, 420 F.3d at 228-231 (Alito, J., dissenting).

In view of this divergence of opinion regarding the proper construction of ERISA's break-in-service rules, it is clear to us that there was no culpability or bad faith on the part of the Fund in partially denying DiGiacomo's claim for accrued benefits. It is equally clear to us that the Fund's legal position has significant merit. Leaving aside the supporting opinions from the federal appellate courts, the Fund prevailed before the Arbitrator and the District Court in the proceedings below. In addition, the Fund reasonably relied on past decisions from our Court in enforcing its pre-ERISA break-in-service provisions. *See Haas & Cass v. Boeing Co.*, Civ. A. No. 90-7414, 1992 WL 221335, at *4-*7 (E.D.Pa. Sept. 4, 1992), *aff'd without opinion*, 993 F.2d 877 (3d Cir.1993); *see also Tanzillo v. Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140 (3d Cir.1985). In these circumstances, we find no basis for a discretionary award of attorney's fees to the prevailing party.

Appendix

Even assuming, without deciding, that the remaining *Ursic* factors weigh in favor of an award of attorney's fees, we believe that the first and fifth *Ursic* factors so strongly militate against such an award as to control our determination. Accordingly, we will deny DiGiacomo's application for attorney's fees.

NO. 05-1033

Supreme Court, U.S.
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In The
Supreme Court of the United States

ALFRED DIGIACOMO,

Petitioner,

v.

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether ERISA Section 502(g)(1) mandates that the award of attorneys' fees be given to the prevailing party, where the plain language of the fee shifting provision permits an award to either party at the discretion of the court?

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INTRODUCTION

ERISA Section 502(g)(1), 29 U.S.C. § 1132(g)(1) permits a court the discretion to award reasonable attorneys' fees and costs to either party in actions involving participants, beneficiaries or fiduciaries under that sub-chapter of ERISA. The provision permits the Court the discretion of awarding attorneys' fees to a prevailing party, but does not make it mandatory. This can be compared to ERISA Section 502(g)(2) in which Congress required the award of mandatory attorneys' fees to a plan which successfully enforces ERISA, Section 515, 29 U.S.C. § 1145. Petitioner's statement that participants and beneficiaries have difficulty obtaining representation on a contingency fee basis, without the presumption of attorneys' fees is pure speculation. The fact is that the pool of attorneys knowledgeable in ERISA is limited, with many representing ERISA funds or employers. Petitioner has produced no evidence that participants and beneficiaries in those minority jurisdictions with a presumption of attorneys' fees to the prevailing plaintiff have any greater access to legal representation.

This Court has found such a presumption of attorneys' fees in Civil Rights cases. However, there is also a greater public interest in civil rights cases as they often involve the protection of constitutional rights. There is no "private attorney general" doctrine to invoke in an ERISA case. ERISA only protects the economic interest of the individual participants and beneficiaries by not allowing employers to apply arbitrary rules in the

administration of a pension promised to its employees. Although those interests are important, they do not rise to the level of a clearly defined constitutional right.

The majority of circuits, including the Third Circuit, apply a five-factor test in determining whether to award attorneys' fees and costs in such cases. Petitioner's assertion that the courts use bad faith as a watershed factor is misguided. Bad faith is only one of the five factors that are considered in determining whether to grant attorneys' fees. In DiGiacomo, the Third Circuit did not exclusively give weight to a lack of bad faith, also finding that there was considerable merit to the Pension Fund's argument in the 2-1 split decision.

There is no compelling reason to review this matter in that there is no important issue of public interest raised in DiGiacomo's petition.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case is confined largely to setting forth the nature of the case in the proceedings below. Teamsters Pension Trust Fund of Philadelphia and Vicinity ("Pension Fund") does not disagree with that recitation. However, Petitioner's Statement of the Case fails to include numerous key facts that are material to the question presented.

DiGiacomo worked in Covered Employment from 1960 through 1971, earning either a full or half year benefit service credit in each of those years.

Between 1972 and 1977, DiGiacomo did not work in Covered Employment. Beginning in 1978, DiGiacomo once again worked in Covered Employment. DiGiacomo's benefit service credit earned for the years from 1960 through 1971 was forfeited by reason of the Break In Service provisions of the pension plan.

On February 4, 2000, DiGiacomo applied to the Pension Fund for a pension. On March 17, 2000, DiGiacomo's application was approved. DiGiacomo was credited with 16.78 years of contributory benefit service for his continuous Covered Employment for the period from 1979 to 1993. He was not credited with over ten years of benefit service from 1961 through 1971 because he was not in covered employment for a period of more than 156 consecutive calendar weeks, resulting in a break in service, per the terms of the plan prior to January 1, 1976.

DiGiacomo filed an appeal of the Administrator's calculation of benefit service credit to the Pension Plan's Board of Trustees, averring that he was entitled to benefit service credit earned prior to his break in service. After a hearing, the Trustees denied DiGiacomo's appeal, relying on the terms of the plan's pre-ERISA break-in-service provision.

DiGiacomo appealed the Trustees' decision to the American Arbitration Association. On October 17, 2001, an arbitration hearing was conducted. On November 1, 2001, the arbitrator denied DiGiacomo's appeal and upheld the Administrator's

determination that DiGiacomo's break in service canceled his vesting and benefit service for the period from 1960 to 1971.

On March 15, 2004, DiGiacomo filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking benefit service credit for the period from 1960 to 1971 that had been forfeited by application of the Plan's Break In Service Rules. The complaint averred that the Pension Fund violated ERISA § 202(b) and § 204(b)(1)(D) by applying the pre-ERISA break in service provisions of the plan. The Pension Fund filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). On July 29, 2004, the District Court granted the Pension Fund's motion to dismiss, relying on the Third Circuit precedent of *Tanzillo v. Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140, 145 (3d Cir. 1985) and *Haas & Cass v. Boeing Co.*, 1992 WL 221335, *aff'd without op*, 993 F.2d 877 (3d Cir. 1993).

On August 24, 2005, the Third Circuit reversed and remanded the case to the District Court. In its decision, the court noted that the Second Circuit[1] and the Seventh Circuit had examined and analyzed the issue and reached contrary conclusions. *DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 420 F.3d 220, 225 (3d Cir. 2005) *cert. denied*, ___ U.S. ____ (2006). The Third Circuit held, in a 2-1

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[1] *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151 (2d Cir. 2003); *Jones v. UOP*, 16 F.3d 141(7th Cir. 1994)

split decision[2], that for accrual of benefit purposes, ERISA prevents pension plans from denying credit for pre-ERISA service time accrued prior to a break in service. The Pension Fund's Petition for Writ of Certiorari was denied on March 6, 2006. On October 19, 2005 Petitioner filed a motion for attorneys' fees. Respondent began to prepare a response to the motion on October 21, 2005 for the November 3, 2005 deadline. On November 2, 2005, Respondent received a notice that the Third Circuit requested a response to the motion by November 8, 2005. Respondent filed the response on November 8, 2005. On November 15, 2005, the Third Circuit denied DiGiacomo's Motion for Attorneys' Fees.

REASONS FOR DENYING THE WRIT

Under Rule 10 of this Court's Rules, a petition for Writ of Certiorari shall only be granted for compelling reasons. The variance in the circuits' interpretation of ERISA Section 502(g)(1), 29 U.S.C. § 1132(g)(1), do not rise to such a level to require this Court's review. The Petitioner admitted that most circuits, including the Third Circuit, have adopted a five-factor analysis for applying the Court's discretionary ability to award reasonable attorneys' fees and costs under ERISA Section 502(g)(1). The five factor analysis, first articulated in *Eaves v.*

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[2] In his dissenting opinion, Judge Alito, averred that § 204, 29 U.S.C. § 1054 does not give an unconditional right to receive benefits and that "under the minimum vesting standards in § 203, the Plan was plainly allowed to treat benefits accrued prior to 1972 as forfeitable upon a break in service". *DiGiacomo*, 420 F.3d 220, 228.

Penn, 587 F.2d 453 (10th Cir. 1978), does not prevent a prevailing plaintiff from receiving attorneys' fees and costs. It merely provides guidance for a court to determine whether to use its discretion to award attorneys' fees.

The petitioner seeks to have this Court adopt a minority view, that there should be a presumption of attorneys' fees for the prevailing party. Petitioner fails to address why Congress did not simply include such language in ERISA Section 502(g)(1), in light of the clear mandate for attorneys' fees and costs under ERISA Section 502(g)(2) to a prevailing plan.

Moreover, the analogy to civil rights statutes is flawed in that there is no "private attorney general" mandate contained in ERISA.

I. THERE IS NO INDICATION THAT CONGRESS INTENDED A PRESUMPTION TO GRANT ATTORNEYS' FEES TO THE PREVAILING PARTY

The Third Circuit declined to award the Petitioner Alfred DiGiacomo attorneys' fees and costs, exercising its discretion under ERISA Section 502(g)(1), 29 U.S.C. § 1132(g)(1).

ERISA 29 U.S.C. § 1132(g)(1), states in pertinent part that:

> (1) In any action under this sub-chapter (other than an action described in Paragraph (2)) by a participant,